

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 04-33896
)	
Robert W. Miller and Cynthia D. Miller,)	Chapter 7
)	
Debtors.)	Adv. Pro. No. 04-3350
)	
Elaine L. Chao, Secretary of Labor,)	Hon. Mary Ann Whipple
United States Department of Labor,)	
)	
)	
Plaintiff,)	
)	
v.)	
)	
Robert W. Miller and Cynthia D. Miller,)	
)	
Defendants.)	

**MEMORANDUM OF DECISION AND
ORDER DENYING MOTION TO DISMISS**

Robert W. Miller and Cynthia D. Miller (“Defendants”) are before the court on the Motion to Dismiss that they filed in this adversary proceeding on October 28, 2004. Defendants contend that the complaint should be dismissed as untimely filed. After reviewing the motion and the opposing memorandum filed by Elaine L. Chao, Secretary of Labor, United States Department of Labor (“Plaintiff”), the court will deny Defendants’ motion.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on May 10, 2004. They did not file schedules of assets and liabilities or related schedules and statements, and the mailing matrix they submitted did not include Plaintiff. The court scheduled a § 341(a) meeting of creditors for July 6, 2004, so the deadline for complaints to determine the dischargeability of debts under 11 U.S.C. § 523(a)(2), (4), (6), and (15) expired on September 7, 2004. Fed. R. Bankr. P. 4007(c); 11 U.S.C. §

523(c).¹ On May 16, 2004, the court sent a notice of that deadline to the 23 creditors listed in the Defendants' original mailing matrix.

Defendants did not file their schedules and statements within 15 days after the commencement of their Chapter 7 case as required by Rule 1007(c) of the Federal Rules of Bankruptcy Procedure, and they did not move for an extension of the time for doing so as authorized by that rule. Accordingly, on June 22, 2004, the court issued an order to show cause requiring Defendants to file a response or the schedules and statements by June 30, 2004. On that date, Defendants filed a motion for an extension of the deadline to file schedules and statements through July 9, 2004, and, by an order entered on July 8, 2004, the extension was granted. Because Defendants had not yet filed schedules, the meeting of creditors was not conducted on July 6, 2004.

On July 9, 2004, Defendants filed their schedules of assets and liabilities, and the meeting of creditors was rescheduled for July 27, 2004. The schedules listed 159 creditors, among them the "Office of Solicitor, 230 South Dearborn St, 8th Floor, Chicago, IL 60604," which was scheduled as holding an unsecured nonpriority debt in the amount of \$6,313.39. The meeting of creditors was conducted and the trustee filed a "no asset" report on July 27, 2004. The court granted Defendants a discharge on September 9, 2004, and a notice of the discharge was mailed to all creditors – including Plaintiff – on September 11, 2004. On September 17, 2004, Plaintiff filed the complaint initiating this proceeding, which seeks a determination that Defendants' indebtedness to Plaintiff is nondischargeable under 11 U.S.C. § 523(a)(4).

As indicated above, Defendants filed their Motion to Dismiss on October 28, 2004. On November 4, 2004, Plaintiff filed Plaintiff's Memorandum in Opposition to Debtors' Motion to Dismiss Secretary's Adversary Complaint. That memorandum contends that the court should exercise its equitable authority to consider the untimely complaint or, alternatively, that Defendants' failure properly to list the debt renders the debt nondischargeable under 11 U.S.C. § 523(a)(3). The memorandum is appended with a declaration of the custodian of the records of the Employee Benefits Security Administration of the United States

¹ The deadline would otherwise expire on September 4, 2004, but, since that was a Saturday and the following Monday was Labor Day, the deadline did not expire until Tuesday, September 7, 2004. Fed. R. Bankr. P. 9006(a).

Department of Labor, attesting that “September 14, 2004, was the first time that EBSA received notice that Robert and Cynthia Miller filed for bankruptcy protection.” Also attached to the memorandum was a copy of a Consent Judgment and Order granting judgment to Plaintiff and against Defendants in the amount of \$6,313.39; the address for Plaintiff’s attorneys stated thereon was the same address set forth in the Schedule F that Defendants eventually filed. Defendants have not filed a reply or otherwise disputed Plaintiff’s assertion that it did not receive notice of the bankruptcy until three days before filing the complaint initiating this proceeding.

LAW AND ANALYSIS

Because Rule 4007(c) of the Federal Rules of Bankruptcy Procedure establishes the deadline for a § 523(a)(4) complaint as “60 days after the *first* date set for the meeting of creditors under § 341(a),” the rescheduling of the meeting from July 6 to July 27, 2004, did not alter the deadline. However, the rule also requires: “The court shall give all creditors no less than 30 days’ notice of the time so fixed in the manner provided in Rule 2002.” The court is authorized to direct that someone other than the clerk give the notice, Fed. R. Bankr. P. 2002(f)(5), and the court has done so under the circumstances of this case: “The debtor shall be responsible to cure, by re-serving affected creditors and parties in interest, any noticing deficiencies resulting from incomplete lists of creditors” *In re Provisions for Submission of Matrices*, Gen. Order No. 02-1 (Bankr. N.D. Ohio Apr. 12, 2002), *available at* www.ohnb.uscourts.gov/judges/GeneralOrders/go-02-1.pdf . Defendants apparently did not fulfill this obligation, as the file contains no certificate of service indicating that they sent copies of the initial notice of the case to Plaintiff or any of the other 135 creditors added to the mailing list when the schedules were finally filed. Accordingly, Plaintiff did not receive 30 days’ notice of the deadline to file a § 523(a)(4) complaint.

Rule 9006(b)(3) provides that the court may enlarge the time for filing such a complaint “only to the extent and under the conditions stated” in Rule 4007(c). That rule, in turn, permits an extension of the deadline only if the motion is “filed before the time has expired.” “These rules, however, must be read together with the general powers given to the courts in bankruptcy under 11 U.S.C. § 105.” *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337, 341 (6th Cir. 2003). Thus, the Sixth Circuit has held “that the bankruptcy court could use its equitable power to circumvent the time limits required by Rule 4007(c) where

an error of the court itself had caused the untimely filing.” *Id.* at 343 (citing *Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629 (6th Cir. 1994)). The court went on to explain:

There are five factors that should be considered when deciding to apply the doctrine of equitable tolling: “The factors are: (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one’s rights; (4) absence of prejudice to the defendant; and (5) a plaintiff’s reasonableness in remaining ignorant of the notice requirement.”

Id. at 344 (quoting *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988)). Here, because Plaintiff was not on the 23-creditor mailing list on file at the time the clerk mailed the notice of the complaint deadline and because Defendants did not send copies to the 136 creditors added when they filed their schedules, Plaintiff lacked actual notice of the filing requirement. There is no allegation that she had constructive knowledge, and Plaintiff was diligent in pursuing her rights as she filed the complaint initiating this adversary proceeding just three days after learning of the bankruptcy case. Permitting the filing would not prejudice Defendants, particularly since they caused the delay by including only 23 of their 159 creditors on their original mailing matrix then failing to give notice of the complaint deadline to the 136 creditors not receiving the clerk’s notice. Finally, there is no indication that Plaintiff had any reason to investigate whether Defendants had filed a bankruptcy petition, so her ignorance of the bankruptcy filing and the deadline for filing nondischargeability complaints under § 523(a)(4) was reasonable.

Accordingly, equitable tolling applies, and Plaintiff’s complaint may be deemed timely. *See, e.g., In re Eliscu*, 85 B.R. 480, 482 (Bankr. N.D. Ill. 1988) (creditor was omitted from schedules, so did not learn of case until after deadline had expired). The Sixth Circuit held in *Isaacman* that an untimely complaint is not subject to dismissal when the court gave notice of an incorrect filing deadline, so it follows that the complaint initiating this proceeding is not subject to dismissal since the court gave Plaintiff *no* notice of the deadline, and that is especially so since the lack of notice is a result of Defendants’ failures to submit a complete mailing list, timely to file schedules, and to send notice of the deadline to Plaintiff (and 135 other creditors).

While Defendants may be correct that, “when no extension has been sought, the vast majority of courts have decided that the Bankruptcy Court has no discretion to enlarge the time past the deadline,” that is not the law in the Sixth Circuit. Since the Supreme Court recently declined to address “[w]hether the Rules, despite their strict limitations, could be softened on equitable grounds,” *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004) (holding that Federal Rules of Bankruptcy Procedure 4004 (establishing deadline for complaints to bar discharge) and 9006(b)(3) are not “jurisdictional”), the *Maughan* decision, holding that equitable tolling does apply to untimely complaints to determine nondischargeability of debts, remains binding precedent in this circuit. Moreover, even if this court were bound strictly to apply Rule 4007(c), permitting no extensions sought after the expiration of the deadline, the complaint would not be subject to dismissal. Section 523(a)(3) of the Bankruptcy Code provides, in pertinent part:

A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit . . . if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, . . . timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely . . . request

11 U.S.C. § 523(a)(3)(B). Defendants delayed in listing and scheduling Plaintiff until after the clerk sent the notice of the complaint deadline to the creditors originally disclosed and, since Defendants did not send Plaintiff a copy of that notice as this court requires, the listing of Plaintiff and the scheduling of the debt to her was not done in time to permit a timely complaint under § 523(a)(4). For those reasons and because Defendants do not dispute that Plaintiff did not otherwise have notice or actual knowledge of the case in time to file a timely complaint, the debt would be excepted from discharge under § 523(a)(3) if the court determines that it would have been excepted from discharge under § 523(a)(4) had the complaint been timely. Because a § 523(a)(3) complaint is not subject to the time limit prescribed by § 523(c) and Rule 4007(c) of the Federal Rules of Bankruptcy Procedure, Fed. R. Bankr. P. 4007(b); *e.g.*, *In re Romano*,

59 Fed. Appx. 709, 712 n.3 (6th Cir. 2003), *available at* 2003 WL 731723, at **3, Plaintiff's complaint was timely.²

THEREFORE, for the foregoing reasons,

IT IS ORDERED that the Motion to Dismiss [Doc. #9] is denied and, in accordance with Rule 7012(a) of the Federal Rules of Bankruptcy Procedure, Defendants shall serve their answer to Plaintiff's complaint within 10 days after notice of this order. A further pretrial scheduling conference shall be set by separate order of the court.

Mary Ann Whipple
United States Bankruptcy Judge

² Indeed, relief under § 523(a)(3) may be sought in a state or federal district court, as the bankruptcy court is vested with concurrent – not exclusive – jurisdiction over such claims. *E.g.*, *McGhan v. Rutz* (*In re McGhan*), 288 F.3d 1172, 1181 (9th Cir. 2002); *Casey v. Mohamed*, No. 10 Civ. 11377(VM), 2005 WL 267566, at *2 (S.D.N.Y. Feb. 3, 2005); *In re Gray*, 60 B.R. 428, 430 (D.R.I. 1986); *In re McGregor*, 233 B.R. 406, 408 (Bankr. S.D. Ohio 1999); *In re Scott*, 244 B.R. 885, 887 n.2 (Bankr. E.D. Mich. 1999); *In re Milburn*, 218 B.R. 862, 864-65 (Bankr. W.D. Ky. 1998); *In re Rediker*, 25 B.R. 71, 74 (Bankr. M.D. Tenn. 1982). Plaintiff thus has the option of voluntarily dismissing this adversary proceeding and seeking a determination of nondischargeability in nonbankruptcy forum, such as the United States District Court that entered the Consent Judgment and Order against Defendants. *See* Fed. R. Bankr. P. 7041; Fed. R. Civ. P. 41(a)(1)(i) (plaintiff may dismiss complaint, without prejudice and without leave of court, by filing notice of dismissal before service of answer or motion for summary judgment). If Plaintiff elects to proceed in this court, her complaint will be deemed amended to assert a cause of action under 11 U.S.C. § 523(a)(3)(B), as well as § 523(a)(4).